

**LOUISIANA STATE LAW INSTITUTE**

**MEETING OF THE COUNCIL**

**March 5, 2021**

**Friday, March 5, 2021**

**Persons Present:**

Abadie, Rachel	Lampert, Loren M.
Adams, Marguerite (Peggy) L.	LaVergne, Luke A.
Alford, Cory	LeDuff, Taylor M.
Becnel, Sadie	Lee, Amy Allums
Belleau, Ashley L.	Levy, Robert
Bowers, Clinton M.	Little, F.A., Jr.
Braun, Jessica	Maloney, Marilyn C.
Breard, L. Kent	Manning, C. Wendell
Carroll, Andrea B.	Medlin, Kay C.
Cassagne, Rachal C.	Mire, Alaina R.
Castle, Marilyn	Norman, Rick J.
Chehardy, Susan M.	North, Donald W.
Comeaux, Jeanne C.	Papillion, Darrel James
Coreil, Jeffrey	Peterson, Megan S.
Craig, Chandler	Phillips, Harry "Skip", Jr.
Crigler, James C., Jr.	Price, Donald W.
Crigler, John D.	Rayford, Andrew C.
Cromwell, L. David	Rivere, Christopher H.
Davrados, Nikolaos A.	Robert, Deidre Deculus
Dawkins, Robert G.	Roussel, Randy
Forrester, William R., Jr.	Schimpf, Michael C.
Freel, Angelique D.	Schlegel, Scott
Gaines, Randal L.	Singleary, Robert
Gasaway, Grace B.	Smith, Annie
Gauthier, Emily M.	Stuckey, James A.
Gonzales, Zack	Thibeaux, Robert P.
Guidry-Leingang, Kansas M.	Title, Peter S.
Griffin, Piper, D.	Tooley-Knoblett, Dian
Hamilton, Leo C.	Tucker, Zelda W.
Hayes, Thomas M., III	Vance, Shawn D.
Haymon, Cordell, H.	Ventulan, Josef Philip M.
Hebert, Christopher B.	Veron, J. Michael
Hogan, Lila T.	Waller, Mallory
Holdridge, Guy	White, H. Aubrey, III
Janke, Benjamin West	Woodruff-White, Lisa
Knighten, Arlene D.	Ziober, John David
Kunkel, Nick	

President Rick J. Norman called the Zoom meeting of the Council to order at 9:00 a.m. on Friday, March 5, 2021. Several administrative announcements concerning meeting procedures and other matters were made, after which the President called on Professor Andrea B. Carroll, Reporter of the Marriage-Persons Committee, to begin her presentation of materials.

**Marriage-Persons Committee**

Professor Carroll noted that she would be presenting the final changes to the domestic abuse definition bill that was introduced during the 2020 Regular Session as House Bill No. 727 but was delayed due to the COVID-19 pandemic.

The Reporter reminded the Council that at its last meeting, the second factor in Civil Code Article 134 was amended with the intent of expanding coverage. However, the Marriage-Persons Committee revisited the change adopted by the Council and found it to be problematic. Professor Carroll explained that the term "household" is not defined in the Civil Code and, by adding a location to the factor, the application is, in fact, narrower. The Committee also suggested the adoption of a Comment explaining that the potential for abuse in the first factor is distinguishable from the existence of abuse in the second factor, but together the factors are intended to be comprehensive. With little discussion, the following was adopted:

**Article 134. Factors in determining child's best interest**

A. Except as provided in Paragraph B of this Article, the court shall consider all relevant factors in determining the best interest of the child, including:

\* \* \*

(2) The existence, effect, and duration of any act of domestic abuse which may affect the child.

\* \* \*

**Revision Comments – 2021**

(b) In Paragraph A, factors (1) and (2) are intended to be comprehensive. The best interest of the child is impacted by abuse of the child, abuse of other household members, domestic abuse by a party against a non-household member, and any other abuse to which the child is exposed or by which the child may be affected. Under this revision, the court must consider not only the actual abuse which may have an effect on the child, but also facts and circumstances that give rise to the potential that the child will be exposed to abuse.

Professor Carroll then noted that the last issue regarding this material is a proposed amendment to Civil Code Article 136. Present law authorizes an award of visitation to a grandparent, other relative, or former stepparent or stepgrandparent under certain circumstances. The law requires the court to consider only the five factors listed in the Article, and domestic abuse advocates suggested the addition of the potential for the child to be abused or to be exposed to domestic abuse as the sixth factor. The Marriage-Persons Committee was surprised that this is not already a factor and suggests approving the recommended change. The Reporter opined that this listing is relatively new to the law and perhaps the factor was simply missed. Without discussion, the following was approved:

**Article 136. Award of visitation rights**

\* \* \*

D. In determining the best interest of the child under Subparagraph (B)(1) or (2) of this Article, the court shall consider only the following factors:

\* \* \*

(6) The potential for the child to be abused or to be exposed to domestic abuse.

\* \* \*

At this time, Professor Carroll concluded her presentation, and the President called on Ms. Mallory Waller, Staff Attorney for the Code of Civil Procedure Committee, to begin that Committee's presentation of materials.

**Code of Civil Procedure Committee**

Ms. Waller reminded the Council that an issue had arisen at its last meeting with respect to R.S. 9:2603, on page 1 of the materials. Specifically, she noted that a question had been raised concerning the bracketed language on line 12, which contains a reference to R.S. 10:1-107, a provision that no longer appears in the Uniform Commercial Code. Ms. Waller then noted that the Reporter of the Uniform Commercial Code Committee, Jim Stuckey, had coordinated with Council members David Cromwell and Marilyn Maloney on this issue and that they had ultimately concluded that the bracketed language should simply be deleted. A motion was made and seconded to remove this language from line 12, and the motion passed with no objection. The adopted proposal reads as follows:

**R.S. 9:2603. Scope**

\* \* \*

B. This Chapter shall not apply to:

\* \* \*

(2) A transaction to the extent it is governed by the provisions of Title 10 of the Louisiana Revised Statutes of 1950, ~~other than R.S. 10:1-107.~~

\* \* \*

The President then called on Mr. Randy Roussel, Reporter of the Common Interest Ownership Regimes Committee, to begin his presentation of materials.

**Common Interest Ownership Regimes Committee**

The Reporter began by reminding the Council that it had approved most of the definitions in Subpart A of the proposed Planned Community Act at its last meeting and noted that today, he would present the remaining definitions for consideration.

Directing the Council to Section 1.2 of the materials, the Reporter first noted that the Committee proposes keeping the definitions as consistent with the Uniform Common Interest Ownership Act as possible. At the last Council meeting, the definition of "affiliate of the declarant" was questioned and ultimately recommitted. The Reporter explained that this term is only used three times in the Act and that its narrow application is likely to prohibit any potential loopholes. The Committee thus recommends adoption of the original proposal. Without discussion, the Council approved the following:

**1.2. Definitions**

In this Part, the following terms have the following meanings:

(1) "Affiliate of the declarant" means any person who controls, is controlled by, or is under common control with a declarant. For purposes of this definition:

(a) A person controls a declarant if the person:

(i) Is a general partner, officer, director, employer, or a manager of a limited liability company of the declarant;

(ii) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds the power to vote, or holds proxies representing, more than twenty percent of the voting interest in the declarant;

(iii) Controls in any manner the election of a majority of the directors of the declarant; or

(iv) Has contributed more than twenty percent of the capital of the declarant.

(b) A person is controlled by a declarant if the declarant:

(i) Is a general partner, officer, director, employer, or a manager of a limited liability company of the person;

(ii) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds the power to vote, or holds proxies representing, more than twenty percent of the voting interest in the person;

(iii) Controls in any manner the election of a majority of the directors of the person; or

(iv) Has contributed more than twenty percent of the capital of the person; and

(c) Control does not exist if the powers described in this definition are held solely as security for an obligation and are not exercised.

Mr. Roussel then noted that Section 1.2(14), the definition of "director," is new because of the change from "executive board" to "board of directors" adopted at the last Council meeting. The following was approved:

**1.2. Definitions**

In this Part, the following terms have the following meanings:

\* \* \*

(14) "Director" means a member of the board of directors elected or appointed to conduct and supervise the affairs of the association.

\* \* \*

The Reporter then reminded the Council that Section 1.2(22) and (27), the definitions of "nonresidential use" and "residential use," were recommitted due to concerns of mixing references to the type of use with the type of structure encompassing that use and co-ownership notions. Mr. Roussel explained that the Committee had redrafted these proposals to alleviate the concerns raised while mimicking language from Fannie Mae, the Federal National Mortgage Association. With little discussion, the following was approved:

**1.2. Definitions**

In this Part, the following terms have the following meanings:

\* \* \*

(22) "Nonresidential use" means any commercial, office, retail, or similar type of use, including the use of a residential building containing more than four separate housing units located on a single lot and owned by the same person or persons.

\* \* \*

(27) "Residential use" means the use of a lot as a residence, including a multi-unit building used as a residence, provided the building contains four or fewer separate housing units, is located on a single lot, and is owned by the same person or persons.

\* \* \*

Next, Mr. Roussel explained that Section 1.2(24), the definition of "person," is also new because of the Council discussion regarding whether the Planned Community Act includes both natural and juridical persons. Without further dialogue, the following was approved:

### **1.2. Definitions**

In this Part, the following terms have the following meanings:

\* \* \*

(24) "Person" means both natural and juridical persons as defined in Civil Code Article 24, unless otherwise indicated.

\* \* \*

Moving to Section 1.2(31), Mr. Roussel read the definition of "special declarant rights" and with the correction of one typographical error, the following was adopted:

### **1.2. Definitions**

In this Part, the following terms have the following meanings:

\* \* \*

(31) "Special declarant rights" means rights reserved for the benefit of a declarant to do any of the following:

(a) Complete improvements indicated on plats filed with the declaration.

(b) Exercise any development right.

(c) Exercise sales and marketing rights in accordance with Section 2.9.

(d) Establish any use servitudes through the common areas for making improvements within the planned community or within immovable property that may be added to the planned community.

(e) Make the planned community subject to a master association.

(f) Combine a planned community with another planned community.

(g) Appoint or remove any officer of the association or any master association or any director during any period of declarant control.

(h) Control any construction, design review, or aesthetic standards committee or process.

(i) Attend meetings of the lot owners and, except during an executive session, the executive board.

(j) Have access to the records of the association to the same extent as a lot owner.

(k) Set the number of directors and officers of the association.

\* \* \*

Mr. Roussel next noted that Section 1.2(32) and (33) were categories of voting and that requiring a supermajority vote is an extremely high threshold of the entire voting interest, whereas a two-thirds vote consists of just two-thirds of the voting interest present. Without question, the provisions were approved as presented. Section 1.2(34) defining "unrelated purchaser," however, caused the Council some concern. The Council questioned whether affiliates can be natural persons and the different standards of twenty percent for affiliates and ten percent for family members. A Council member also noted a structural issue because the definition begins with unrelated purchaser, but the second sentence states who related purchasers are. The Council offered a few amendments, but the Reporter requested to recommit the definition for further reflection by the Committee.

The final two definitions of "vote" and "voting interest" in Section 1.2(35) and (36) were briefly discussed, and the following were approved:

**1.2. Definitions**

In this Part, the following terms have the following meanings:

\* \* \*

(35) "Vote" means consent, waiver, ballot, or proxy by a method permitted by Section 3.11.

(36) "Voting interest" or "voting power" means the votes allocated to a lot in the declaration.

Moving to the Comments, the Council suggested that the phrase "under real estate law" in Comment (a) is not in keeping with the civilian tradition. The Reporter accepted the proposed change of this language to "under property law" with the intent to convey to the reader that this area of the law should be governed by corporate law and not building restrictions related to immovable property. The Reporter also changed "by at least eighty percent" to "a supermajority vote." The Council noted that Comment (c) would also need revision in light of the newly adopted definitions of non-residential and residential use. The Reporter accepted the suggested changes, and all of the following was approved:

**Revision Comments – 2022**

(a) The actions of the association are intended to follow corporate governance rules, rather than compliance with rules for the imposition of building restrictions under property law. Matters of routine administration and governance are undertaken by the required vote at a meeting at which a quorum is present. Matters requiring a supermajority vote, such as adding or removing property from the planned community or imposing more burdensome restrictions, are undertaken by a supermajority vote of the total membership of the planned community. The distinction is intentional.

(b) See R.S. 1:7 that provides that words used in the singular number include the plural.

(c) In Paragraphs (22) and (27) housing units owned by spouses, whether pursuant to a community or separate property regime, are considered owned by the same person.

At this time, the Reporter noted that the Committee still has a few recommitments to present to the Council before presenting the final section of the Act regarding consumer protections. He also noted his hope that the project will be completed and approved for submission to the legislature during the 2022 Regular Session. Mr. Roussel then concluded his presentation, and the Council briefly returned to materials presented by the Code of Civil Procedure Committee at the Council's last meeting.

**Code of Civil Procedure Committee**

Specifically, the Council turned to Code of Civil Procedure Article 1313, on page 5 of the "Technology Commission" materials. One Council member questioned the requirement on line 44 that the sender must have received an "electronic confirmation of receipt" and expressed concern over the potential for the opposing party to evade service by electing not to send a "read receipt" with respect to an email that was, in fact, actually received. The Council then engaged in a great deal of discussion with respect to the meaning of this phrase, which was used in the Law Institute's Private Works Act revision, and several members noted that it is intended to include not only "read receipts" but also transmissions that are sent when the recipient elects not to send a "read receipt." It was explained that these transmissions are styled as confirmations of delivery because they inform the sender that the transmission was received by the recipient's server but do not provide any additional information as to whether the recipient opened the email, and if so, at what time. Judge Holdridge also noted that if the sender is not sure whether this requirement concerning "electronic confirmation of receipt" has been satisfied, he can always choose to send the notice by registered or certified mail or by commercial courier.

The Council continued to discuss this issue, with one member noting that with respect to the provisions of LUETA, specifically R.S. 9:2615, the Louisiana Supreme Court recognized in *In re Tillman* that receipt of an electronic communication occurs when the communication reaches the recipient's system, regardless of whether the recipient is aware of the communication or ever retrieves or reads it. The Council also discussed the manner in which notice is sent and received by the parties through the unified federal e-filing system. After additional discussion, including the fact that the proposed revisions would have a delayed effective date of January 1, 2022 for implementation and education purposes, one Council member suggested changing "receipt" to "delivery" on line 44 of page 5 of the "Technology Commission" materials for purposes of clarification. A motion was made and seconded to adopt this change, and the motion passed with no objection. The adopted proposal reads as follows:

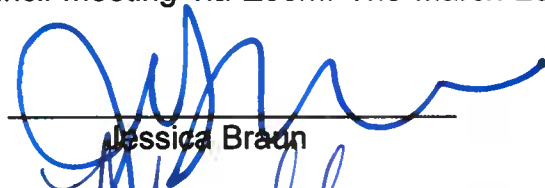

**Article 1313. Service by mail, delivery, or electronic means**

\* \* \*

C. Notwithstanding Paragraph A of this Article, if a pleading or order sets a court date, then service shall be made either by registered or certified mail or as provided in Article 1314, ~~or~~ by actual delivery by a commercial courier, or by emailing the document to the email address designated by counsel or the party. Service by electronic means is complete upon transmission, provided that the sender receives an electronic confirmation of delivery.

\* \* \*

At this time, a few administrative announcements were made concerning CLE credits and plans to hold an April or May Council meeting via Zoom. The March 2021 Council meeting was then adjourned.

  
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Jessica Braun  
  
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Mallory C. Waller